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## CURRENT EVENTS.

A CORRESPONDENT of the *Albany Law Journal*, calls attention to the fact that the Supreme Court of California in deciding the case of Sesler v. Montgomery, 28 Cent. L. J. 474, that words spoken to a wife by the husband, not in the presence of any other person do not constitute a publication within the meaning of the law of slander, treated the question as an entirely new one. He cites the case of Wermhak v. Morgan L. R. 20 Q. B. Div. 635, in which the precise point was decided by the Queen's Bench Division. Mr. Odgers in his law of libel and slander (published before this decision) says: "The question seems never to have arisen in England, possibly because in every such case there has been an immediate and undoubted publication of the same slander or exaggerated version thereof by the wife to some third person, for which the husband would be equally liable in damages and which would be easier to prove."

The most peculiar thing about the California case is that the court seems to have reversed itself on rehearing, without any disclosed reason except the very good but not often admitted one that they were in the first instance wrong upon principle, there being no authority, precedent or argument before them on the rehearing not known to them in the original decision. In the latter (28 Cent. L. J. 30) they say "that husband and wife are one person is a mere fiction" and that on principle a communication by a husband to his wife is a publication. In the opinion on rehearing they declare that "it is no more a fiction than any other general principle of law," and that such a communication does not constitute a publication.

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THE legislatures of Missouri, Kansas, and Texas have enacted statutes against pools, trusts, agreements, combinations and confederations in trade, all of which are of doubtful efficacy, and, in the case of the Missouri one at least, illustrate, in a marked degree, the harm that results from hasty legislation. Of course, being new, there is room for much difference of opinion as to how its provisions will be construed and applied. It was framed without any legislative investigation of the business operations it seems intended to affect and without any consultation with business experts who might have given the legislature some light on the subject. In this regard they could with profit have followed the example of the New York legislature, who, through a committee of the senate, made thorough investigation of the subject. The aim of the Missouri legislature doubtless was merely to relieve business of the tyrranical domination of these trusts. But there is reason to fear that the provisions of the statute strike not only at such combinations, and ineffectively as it may yet appear, but also at some of the harmless and common agreements between individuals and firms in the same line of trade, and that it will hamper private individuals in the conduct of their private business much more than it will the trust for whom the trap was set. If this turns out to be the case and the legislation merely operates as an additional obstruction to the freedom of commerce between private individuals, it will prove a veritable boomerang in the hands of the anti-trust crusaders.

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THE action of the Missouri legislature, in this regard, differs very materially from that of New York, a committee of the latter as above mentioned having submitted a report advising deliberation in dealing with these combinations. They define the trust proper as a combination of two or more persons, partnerships, or corporations in which the absolute control of the property of certain competing interests is placed in the hands of trustees, to be managed by them for the advantage of all concerned, and several owners of the competing properties receiving "certificates" of their interest in the trust in exchange for the property conveyed to it by each, so that each owner of the conveyed property becomes a joint owner of all of the trust estate, his interest corresponding to the value of the property placed in the trust by him. Tried by this measure they say that

many of the organizations commonly known as trusts are not trusts at all, but corners or combinations merely, whose general purpose is to lessen competition and regulate prices. They conclude that while the trust is full of dangers and should be repressed and hedged around by law, it is not, of necessity, a monopoly nor inconsistent with the public advantage within certain reasonable limitations, that the danger arising from the exercise of its power is greatly lessened by the inventions and discoveries of the age; that the new elements on which the principle of combination seizes are balanced and offset by other and, if possible, more powerful forces of modern civilization, and that such balancing forces are far more potent to that end than any arbitrary rules of legislative enactment. They hold that the right of combination among capitalists, manufacturers or common carriers for every purpose consistent with the public welfare should not be unnecessarily restrained but that combinations aiming at monopoly should be rigidly prohibited. They counsel deferring legislative action until the court of last resort shall have passed upon the questions raised in the action by the attorney general against the Sugar Trust.

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In this connection, the language of Chief Justice Fuller in Gibbs v. Consolidated Gas. Co., reported on page 534 of this issue will be of interest. There the principle is clearly announced, though not necessary to the decision of the case, that combinations among those engaged in business impressed with a public or *quasi* public character which are manifestly prejudicial to the public interest cannot be upheld and that it is too well settled to admit of doubt that "a corporation cannot disable itself by contract from performing the public duties which it has undertaken and by agreement compel itself to make public accomodation or convenience subservient to its private interests."

From this decision it seems apparent that the common law imposes on corporations whose business is impressed with a public or *quasi* public character every disability imposed by these statutes, and it may be, every disability which ought in reason and fairness to be imposed.

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Our sympathies are decidedly with the Supreme Court of Georgia in their recent declaration of war against long winded transcripts of records, A case recently appealed to that court, the record of which contained 275 closely written pages, made up in great part of colloquies and court wranglings between counsel, witticisms and retorts of counsel, remarks of the stenographer and page after page of the most irrelevant matter, was refused consideration, the court stating that while they were willing to do everything possible in the discharge of their duties, life was too short and the time required for other litigants too valuable to waste days in reading such a record as that presented. We are rejoiced to see this stand and protest on the part of the court, and trust others will follow the example. There are lawyers who seem to regard a record of a trial court as a narrative of their personal achievements, their legal prowess, their acumen, their brilliant sallies and quick repartee. The sooner such practitioners are lead to think otherwise, and records are eliminated of everything not necessary to a decision of the legal questions involved, the better it will be for the courts and litigants, to say nothing of the profession, the better class of which do not offend in this regard.

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## NOTES OF RECENT DECISIONS.

A decision involving the validity of contract for services in aid of an illegal purpose and one which, to some extent, strikes at the doctrine of combination between corporations, is that of the United States Supreme Court in Gibbs v. Consolidated Gas Company, 9 Sup. Ct. Rep. 553. The plaintiff sued for compensation for services he had rendered in negotiating and consummating a contract for a combination between gas companies. The court lay down the rule that if the contract for combination was forbidden by statute or by public policy, the plaintiff could not recover for services in negotiating the contract. The court directly holds that such a combination as was here attempted was in the teeth of an express statutory prohibition. But their decision is not put wholly on that ground as incidentally their opinion is indicated on

the subject of public policy as forbidding combination. Chief Justice Fuller says:

The decision in Mitchel v. Reynolds, 1 P. Wms. 181, 1 Smith, Lead. Cas. pt. 2, p. 508, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a State of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and, if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable. Rousillon v. Rousillon, L. R. 14 Ch. Div. 351; Cloth Co. v. Lorsont, L. R. 9 Eq. 345. "Cases must be judged according to their circumstances," remarked Mr. Justice Bradley in Navigation Co. v. Winsor, 20 Wall. 64, 68, "and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection and may be enforced." Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or *quasi* public character, which are manifestly prejudicial to the public interest, cannot be upheld. The law "cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn, or in evasion of, what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong—are void." Bish. Cont. § 549; Iron Co. v. Extension Co., 28 Cent. L. J. 454; Trist v. Child, 21 Wall. 441; Irwin v. Williar, 110 U. S. 499, 4 S. C. Rep. 160; Arnot v. Coal Co., 68 N. Y. 558; Salt Co. v. Guthrie, 35 Ohio St. 666; Woodruff v. Berry, 40 Ark. 261; Railroad Co. v. Railroad Co., 3 Rob. (N. Y.) 411; Craft v. McConoughy, 79 Ill. 346; Hooker v. Vandewater, 4 Denio, 349; Stanton v. Allen, 5 Denio, 434; Railroad Co. v. Collins, 40 Ga. 582; Coal Co. v. Coal Co., 68 Pa. St. 173. It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accomodation or convenience subservient to its private interests. "Where," says Mr. Justice Miller, delivering the opinion of the court in Thomas v. Railroad Co., 101 U. S. 71, 83, "a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

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AN interesting question of privileged communications was decided by the Supreme Court of Wisconsin in Selden v. State, 42 N. W. Rep. 218. There defendant was prosecuted for perjury alleged to have been committed in making affidavit that he did not know and could not ascertain where his wife could be found, the purpose of the affidavit being to procure publication of summons in an action for divorce. The circuit court allowed a witness, who was the wife's attorney in the divorce suit, to produce letters written by the husband to the wife during marriage, though the contents were not shown, but only the address, date, etc., which tended to show that defendant did know where his wife was. The court here held this to be error upon the ground that such letters were confidential communications between husband and wife, and also confidential papers between an attorney and client. They say:

So far as Knowles, the attorney of the defendant, Emma, was concerned, the production by him of the letters as genuine was a double violation of this protected confidence: First, of that reposed in him by his client, Emma S. Selden, and, secondly, of that between herself and her husband—without her consent. If these letters were confidential, as between herself and her husband, they were none the less so in the hands of her attorney, Knowles, and, if she could not disclose them, of course he could not. But, besides this, he was betraying her confidences also, which was a double violation of the rule. She had demanded a return of these letters before he so disclosed and produced them. It is surprising that when she was unwilling herself to disclose or produce these letters of her husband, and was unwilling that her attorney, Knowles, should do so, Knowles should have been allowed to authenticate and produce them, and that the district attorney should have been allowed to introduce them in evidence, to the extent they were offered, to convict the husband of the crime with which he was charged. In her letter to her counsel, Knowles, Dated December 1, 1888, she demanded a return of the letters, as she says, "in your charge and left with you while you were acting as my attorney and counsel. I intrusted them with you as such counsel, to be used only in assisting me in litigation, and from which to secure your advice. The letters I consider confidential communications between myself and husband, and in

no other way, and while I was your client I intrusted them with you knowing the confidential relations existing between attorney and client." This letter was in evidence. The authorities cited by the attorney-general are very far from being applicable to a case like this. Knowles was not an "eavesdropper," or a person who merely overheard communications or conversations between husband and wife, and it made no difference in favor of their admissibility that he used the letters as his authority for making the original complaint against the plaintiff in error, or in instituting the prosecution against him. It is a case where the husband is on trial for a crime which did not involve any personal violence or injury against herself, and what he had said or communicated to her as his wife is sought to be proved against him, either by his (the attorney's) voluntary disclosure of them as a witness, or by the production of his letters containing such communications; and, more than this, the letters containing such confidential communications are confided to her counsel for no such purpose, and he voluntarily authenticates and produces them, in violation of her confidences with her husband, and her confidences with himself as her counsel, and without her consent and against her directions. There is not an authority by the decision of any respectable court that sanctions the disclosure of such confidences between husband and wife and attorney and client. Both branches of this evidence are made incompetent by our statute. These statutes express the most stringent rules ever laid down by the courts for the protection of connubial and professional confidences. They would seem to have been specially made for this case. The facts here meet every letter of these statutes. Aside from these statutes, this disability of husband and wife and of an attorney has been established by numberless decisions of the courts in this country and in England. The principles upon which it is established have become elementary. Only a few cases need be referred to, and such as are particularly applicable to the facts. Mills v. U. S., 1 Pin. 73; Yager v. Larsen, 22 Wis. 184; Bliss v. Franklin, 13 Allen, 244; State v. Welch, 26 Me. 30.

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A CONSTRUCTION of the national banking act is to be found in the decision of Thompson v. St. Nicholas Nat. Bank, 21 N. E. Rep. 57. There it was held that the provision of the national banking act which makes it unlawful to certify checks unless the person drawing the check has on deposit with the bank an amount of money equal to the amount of such check, etc., does not render void the making or payment of such check, as a matter of contract between the bank and a depositor who, to secure the bank, has pledged certain bonds. The court says:

The main contention of the appellants is that the transaction by which the defendant certified checks for Capron & Merriam, without having an equivalent amount of money on deposit to meet them, was a violation of section 5208 of the United States Revised Statutes, and that no valid debt against Capron & Merriam was created thereby; or, in other words, that the defendant did not become a *bona fide* holder of such bonds by reason of payments made in pursuance of such alleged illegal and prohibited arrangement. * * * It will be seen that the statute affirms the legality of the contract of certification, and expressly prescribes the consequences which shall follow its violation. It therefore appears that, so far from making the contract of certification void and illegal, its validity is expressly affirmed, and the consequences which follow a violation are specially defined, and impliedly limit the penalty incurred to a forfeiture of the bank's charter and the winding up of its affairs. There is a clear implication from this provision that no other consequences are intended to follow a violation of the statute. It would, indeed, defeat the very policy of an act intended to promote the security and strength of the national banking system if its provisions should be so construed as to inflict a loss upon them, and a consequent impairment of their financial responsibility. The decisions of the Supreme Court of the United States are uniform in giving this construction to the provisions of the national banking act. Bank v. Stewart, 107 U. S. 676; Bank v. Matthews, 98 U. S. 621; Bank v. Whitney, 103 U. S. 99. The principle decided in Bank v. Stewart seems to be in point. There the bank made a loan upon the security of shares of its own stock, which loan was prohibited by section 5201 of the United States statutes. After the debt became due the bank sold the shares and applied their proceeds to the payment of the debt. The administrators of the debtor sued to recover the proceeds of the sale, and it was held that they could not recover, as the contract had been executed. In Bank v. Matthews the court held that a mortgage on real estate taken to secure an existing indebtedness and for future advances was a valid security in the hands of the bank, although by sections 5136 and 5137 of the Revised Statutes of the United States it was impliedly prohibited from taking such securities. It was held that the government alone was entitled to prosecute for the offense committed by the bank in taking a prohibited security, Justice Swayne saying: "The impending danger, of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by congress." The same principle was held by this court in Bank v. Savery, 82 N. Y. 291.

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A GOOD example of a statute void as impairing the obligation of contracts, is found in the case of Phinney v. Phinney, 17 Atl. Rep. 405, decided by the Supreme Court of Maine. It was there held that a mortgage must be governed by the law in existence when executed, both as to its foreclosure and redemption, and that an act extending the time of such foreclosure and redemption was void as impairing the obligation of contracts. The court says:

Does the legislative act upon which this bid is founded so affect the rights of the mortgagee that the obligation of his contract is impaired, and thus entitle him to protection at the hands of the court? While it is not intended to disturb the proper application of the principle that a State, to a certain extent and within proper bounds, may regulate the remedy, yet, if by subsequent enactment it so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests. The constitutional prohibition secures from attack, not merely the con-

tract itself, but all the essential incidents which render it valuable, and enable its owner to enforce it. Thus it was said in the case of Bank v. Sharp, 6 How. 301: "One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligations—dispensing with any part of its force." The doctrine is also there asserted that if, in professing to alter the remedy only, the rights of a contract itself are changed or impaired, it comes within the spirit of the constitutional prohibition; and when the remedy is entirely taken away, or "clogged by condition of any kind, the right of the owner may indeed subsist and be acknowledged, but is impaired." "And the test, as before suggested," remark the court, "is not the extent of the violation of the contract, but the fact that in truth its obligation is lessened, in however small a particular, and not merely altering or regualating the remedy alone." It Louisiana v. New Orleans, 102 U. S. 206, Mr. Justice Field, in the course of the opinion, says: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of those means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." See, also, Green v. Biddle, 8 Wheat. 84. The result arrived at in all the decisions bearing upon this question seems to be that the legislature may alter or vary existing remedies, provided that in so doing their nature and extent are not so changed as materially to impair the rights and interests of parties to existing contracts. This rule, while somewhat vague and unsatisfactory, is the most certain general one of which the nature of the subject admits. The difficulty arises in its application to particular cases, and distinguishing between what are legitimate changes of remedy and those which impair the obligation of contract. Every case must be determined, in a great degree, by its own circumstances. In a leading case upon this point in the United States court (Bronson v. Kinzie, 1 How. 311), the distinction between legislation affecting the remedy only and that which transcends the constitutional limit is carefully given. In that case, as in this, the legislation pertained to the extension of time for the redemption of mortgages. A mortgage was executed in Illinois, containing a power of sale under a decree of foreclosure. Subsequently an act of the legislature was passed, giving the mortgagor twelve months, and any judgment creditor of the mortgagor fifteen months, within which to redeem the mortgaged property from a judicial sale, and prohibiting its sale for less than two-thirds of its appraised value. The court held the act void, as applied to mortgages executed prior to its passage. It was contended in argument in support of the act, as in the case now before us, that it affected only the remedy of the mortgagee, and did not impair the contract. But the court replied that there was no substantial difference between a retrospective law declaring a particular contract to be abrogated and void and one which took away all remedy to enforce it, or incumbered the remedy with conditions that rendered it useless or impracticable to pursue it. The language of Chief Justice Taney, who delivered the opinion of the court, in reference to that statute has an appropriate bearing upon the case before us, and therefore we cannot forbear quoting it: "This brings us to examine the statutes which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to ingraft upon it new conditions, injurious, and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. This law gives to the mortgagor, and to the judgment creditor, an equitable estate in the premises which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the constitution." This decision has since been repeatedly affirmed. The case of McCracken v. Hayward, 2 How. 611, arose the following year, under the same statute law of Illinois, and the same question was involved as in Bronson v. Kinzie, *supra*, except that it arose upon the sale of real estate upon execution. The court arrived at the same conclusion as in the former case. The same is true in the case of Gantly's Lessee v. Ewing, 3 How. 716, which arose under a similar statute in Indiana, and the court there held that the legislature could not, by such a law, impair or defeat the obligation under the disguise of regulating the remedy. The question was again before the court in Howard v. Bugbee, 24 How. 461, upon a statute of Alabama allowing a judgment creditor of a mortgagor to redeem the land within two years after a sale under a decree of foreclosure of the mortgage, and the decision of the court, in accordance with the foregoing principles of the cases cited, was that the statute was unconstitutional, as impairing the obligation of the contract of mortgages, as to all such mortgages as were in existence when the statute was enacted. In various forms and numerous cases the principle has come before the courts, but the doctrine established by the decisions to which we have referred, has been firmly adhered to by the Supreme Court of the United States, and the courts of last resort in most of the States. Additional authorities might be cited, indicating the judicial sentiment and opinion upon this question. Maloney v. Fortune, 14 Iowa, 417, and Cargill v. Power, 1 Mich. 369, where an extension of time for the redemption of a pre-existing mortgage was held unconstitutional: Blair v. Williams, 4 Litt. (Ky.) 34, a law extending the time of a replevin bond beyond that in existence when the contract was made, held unconstitutional: Gunn v. Barry, 15 Wall. 610, and Edwards v. Kearzey, 96 U. S 595, where it was so held in relation to statutes exempting from sale on execution any substantial part of the debtor's property not so exempt at the time the debt was contracted: Brine v. Insurance Co., *Id.* 627, 637, laws in existence in regard to real estate, when a contract is made in relation thereto, including the contract of mortgage, enter into and become a part of

such contract. See, also, *Ex parte* Christy, 3 How. 328; Clark v. Reyburn, 8 Wall. 322; Walker v. Whitehead, 16 Wall. 317, 318; Kring v. Missouri, 107 U. S. 233, 2 S. C. Rep. 443; Memphis v. U. S., 97 U. S. 293; Seibert v. Lewis, 122 U. S. 284, 294, 7 S. C. Rep. 1190; Butz v. City of Muscatine, 8 Wall. 575; Mobile v. Watson, 116 U. S. 305, 6 S. C. Rep. 398; Curran v. State, 15 How. 319. In the case last cited it was said by the court that "it by no means follows, because a law affects only the remedy, that it does impair the obligation of the contract. The obligation of a contract, in the sense in which those words are used in the constitution, is that duty of performing it which is recognized and enforced by the laws; and, if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same."

The court distinguishes the cases of Van Baumboch v. Bade, 9 Wis. 559; Holloway v. Sherman, 12 Iowa, 282; Bank v. Eldredge, 28 Conn. 556; Railroad Co. v. Railroad Co., 59 Me. 31, saying that in those decisions the foreclosure was under proceedings in equity where the court of chancery was authorized to decree foreclosure—a proceeding which has never existed in this State.

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An interesting question of fire insurance arose in the case of Royal Ins. Co. v. Lubelsky, 5 South. Rep. 768, decided by the Supreme Court of Alabama. There, a policy described the insured property as a "dwelling house, when completed to be occupied as a private dwelling house," and provided that if it should become vacant or unoccupied without written permission indorsed on the policy, the policy should be void. At the time of the negotiations, the building was being erected. It was intended that the house should be leased on completion, and the company's agents were so informed, and it was leased two months after the issuing of the policy, but afterwards became vacant and unoccupied, when it was burned. The assured having had knowledge of the vacancy, and not having procured permission therefor, it was held that the policy was forfeited. The court says:

The circumstances surrounding the contracting parties must be taken into consideration in construing this, as all other contracts. When the negotiation for insurance was commenced, as we have said, the house was in process of erection. An agent was authorized to rent it when complete, and the defendant's agents were informed of such purpose. The fence around the premises was completed only two days at most before the date of the policy. In the light of these facts, we must construe the phrase, "when completed to be occupied as a private dwelling-house." The adjudged cases are quite in conflict as to the force to be given phrases analogous to this when inserted in insurance policies. In Joyce v. Insurance Co., 45 Me. 168, it was held that where a house was represented in a policy as "occupied by" the insured, this was a description merely, and did not amount to an agreement that the insured should continue in occupation of it. In Protection Co. v. Douglas, 58 Pa. St. 419, it was held that the insurance of a building as a "dwelling-house," or as an "occupied dwelling-house," does not imply an engagement or warranty that it shall continue occupied while the risk endures. It was regarded by the court as a "matter of description of the subject, rather than stipulation respecting its use." There are other rulings to the same effect. Insurance Co. v. Usaw, 112 Pa. St. 80; Catlin v. Insurance Co., 1 Sum. 435. In the case last cited, the phrase under consideration was, "at present occupied as a dwelling-house, but to be hereafter occupied as a tavern." This was held by Judge Story not to be a warranty of continued occupation of the house as a tavern, but, at furthest, a mere representation of an intention to occupy it as such. In Herrick v. Insurance Co., 48 Me. 558, the Supreme Judicial Court of Maine made a distinction between the representation of an expectation and of an existing fact, the latter being in the nature of a warranty, and the former not. The application for insurance there, in describing the property, used the phrase, "will be occupied by a tenant." This was said not to be a warranty that the house should be occupied by a tenant during the whole period of the risk. There does not appear to have been any clause in the policy making it void, as in this case, in the event of becoming vacant or unoccupied. In Hough v. Insurance Co., 29 Conn. 10, the Connecticut Supreme Court of Errors, in a case where the house was described as "vacant, but to be occupied," held this phrase to imply the reservation of the right to put a tenant in the vacant building, not the incurring of an obligation or warranty to do so. If a warranty, it was said that it would be a question for the jury to determine whether it had remained vacant an unreasonable time. In Alexander v. Insurance Co., 66 N. Y. 464, a policy of fire insurance described the plaintiff's property as "his two story extension frame building occupied as a dwelling." The New York Court of Appeals held that this statement as to occupancy was not necessary to the identification of the building, and, inasmuch as it related to the risk, it was a warranty which would make the contract void, if the house was not at the time occupied as a dwelling. It was construed to affect the risk in view of the provision in the policy that if the premises should become vacant and unoccupied the policy would become void. Construing the present policy in the light of surrounding facts, and construing all its parts together, especially the parts quoted and italicized in the beginning of this opinion, we see but one way in which they can be harmonized. The phrase, "when completed to be occupied as a private dwelling-house," must be taken to represent the mutual expectation of the contracting parties that the house was to be so occupied either by the owner, or some one else by his authority, as tenant or otherwise. * * * The evidence shows that the house was vacated by the tenant, and remained unoccupied, or without any furniture or any human being living in it, for fourteen days, and it was destroyed by fire during this time. It is admitted to have become both vacant and unoccupied. Under all the authorities the policy became *ipso facto* forfeited, and the liability of the insurer terminated, as the fact of non-occupation was known to the insured, and no permission was procured from the company waiving the observance of this condition. And this is so without regard to the period of time this state of vacancy or non-occupancy continued, because it is the express stipulation of the

parties, and such stipulation is the law of the contract, binding alike on the parties and the court. Dennison v. Insurance Co., 52 Iowa, 457; Insurance Co. v. Meyers, 63 Ind. 238; Cook v. Insurance Co., 70 Mo. 610; Insurance Co. v. Padfield, 78 Ill. 167; Gamwell v. Insurance Co., 12 Cush. 167; Soye v. Insurance Co., 6 La. Ann. 761; Alston v. Insurance Co., 80 N. C. 326; Insurance Co. v. Zænger, 63 Ill. 464; Insurance Co. v. Thomas, 74 Ala. 578; Herrman v. Insurance Co., 85 N. Y. 162.

## COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.

1. Introduction.
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7. Where the service Rendered by the Attorney is for a Criminal or Fraudulent Purpose.

1. *Introduction.* — The term, confidential communication, distinguishes a class of evidence which the law excludes on the ground of public policy. It embraces communications to president, governors, and high State officials; sources of information to detective police; proceedings before grand juries; proceedings within the room of a petit jury; facts offensive to public decency; communications between husband and wife; attorney and client. The rule which excludes such communications is founded on the conviction that greater mischief than benefit would flow to society from their admissibility as evidence. Sometimes it is the character of the information, at other times, it is the rights of the person which urge the rule; but, in either case, the rule is founded on public policy.[1]

2. *Attorney and Client — General Rule.* —An attorney cannot be compelled to disclose communications made to him by his client in the line of professional employment.[2] The considerations which give rise to the rule afford a correct guide in its application and are well stated by Chief Justice Shaw, in Hatton v. Robinson, 14 Pick. 422: "The principle of the rule which applies to attorneys and clients is, that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sustain this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed."

3. *Extent of the Rule.*—The privilege extends to all communications made by the client to his attorney for the purpose of obtaining advice for legal purposes, or to enable him to conduct litigation.[3] The rule applies to facts revealed, although they are not essential to a full understanding of the subject presented to the attorney. The client is not presumed to know what is relevant and what is not relevant to his case. For this reason the rule must be applied liberally, that the attorney may be possessed of every fact necessary to establish his client's claim or protect his rights and to give him correct legal advice.[4] Interpreters, law clerks, and the agents of attorneys come within the rule. Whatever is used as a means of communication between the attorney and client is comprehended.[5] It was formerly held that the privilege existed only when the communication was made for the purpose of bringing or defending an action,[6] but courts now apply the rule, not only when attorneys are employed in litigation, but also when they transact business for clients.[7]

4. *Privilege Belongs Only to the Client.*— The secrecy enjoined upon the solicitor or counsel is the personal privilege of the client alone;[8] the latter may waive it if he chooses

[1] 1 Greenl., § 236-7-8.

[2] 1 Greenl., § 237-40, note 2; Coveny v. Tannahill, 1 Hill, 33; Follett v. Jeffreyes, 1 Sim. (N. S.) 3.

[3] 1 Greenl., § 240; 2 Story Eq., § 952; Cholusondeley v. Clinton, 19 Ves. 261; Evitt v. Price, 1 Sim. 483; Peabody v. Norfolk, 98 Mass. 452; Morrison v. Moat, 6 Eng. Law & Eq. 14; Cromack v. Heathcote, 2 Broad. & Bing. 21-9; Granger v. Warrington, 3 Gilm. (Ill.) 299; *In re* Matin, 5 Blatchf. 303; Rhoades v. Selin, 4 Wash. 718.

[4] Cleave v. Jones, 8 Eng. Law & Eq. 554.

[5] Dubarre v. Livette, 'Peake's Cas. 77; Jackson v. French, 3 Wend. 337; Andrews v. Solomon, 1 Pet. C. C. 356; Perkins v. Hawkshaw, 2 Stark, 239; Femoick v. Reed, 1 Meriv. 114.

[6] Williams v. Madie, 1 C. & P. 158.

[7] Greenough v. Gaskell, 1 My. & K. 102.

[8] Lindsey v. Talbot, Bull (N. P.), 284; Wilson v. Rastall, 4 T. R. 753.

and call the attorney to testify as to what passed between them.[9] While counsel will not be allowed to testify whether his client is making the same statement as he made in consultation with him,[10] yet the client can be interrogated as to his own statements to the attorney.[11] Although this was formerly the law, courts now seem to hold that if the attorney will not be permitted to divulge a communication, his client cannot be compelled to state the conversation.[12] In Passamore v. Passamore,[13] the court said: "It is every day practice to permit a party to justify his conduct by testifying that what he did was by advice of counsel, and the counsel is allowed to testify for this purpose, to the advice he gave. There is a privilege of secrecy as to what passes between attorney and client, but it is the privilege of the client and he may waive it if he chooses." This rules applies to all communications made after the relation of attorney and client is established; a retainer need not be paid to fix this relation; it will be sufficient if the attorney has undertaken the business and the communication has been made for the purpose of professional advice.[14]

5. *Where the Relation does not Exist.*—But this rule does not apply whenever an attorney performs an act for his client. The purpose of the rule is to allow full freedom of intercourse whenever the professional aid of in attorney is required; it cannot be invoked to protect one againt his own loquacity and imprudence. Besides, an attorney can have knowledge of many things from his business relation with clients which cannot be said to be known in confidence. Courts have therefore made many distinctions. A man is not acting as an attorney when he is consulted about making a deed;[15] communications, obviously, foreign to the subject under consideration are not privileged,[16] nor if made to one erroneously assumed to be an attorney.[17]

[9] Passmore v. Passmore's Estate, 16 N. W. Rep. 171; 17 Cent. L. J. 19; Fowler v. Schriber, 38 Ill. 172; Benjamin v. Coventry, 19 Wend. 353.

[10] Rex v. Withers, 2 Camp. 578.

[11] Greenough v. Gaskell, *supra*.

[12] Hemenway v. Smith, 28 Vt. 701; Carnes v. Platt, 36 N. Y. Sup. Ct. 360; Bigler v. Reglier, 43 Ind. 112; State v. White, 19 Kas. 445; Phil. Ev., § 833.

[13] *Supra*.

[14] Sargent v. Hampden, 38 Me. 581.

[15] Broad v. Pitt, 3 C. & P. 518.

[16] Cobden v. Kendrick, 4 T. R. 431.

[17] Fountain v. Young, 6 Esp. 113.

An attorney who witnesses dealings between his client and a third person may testify as to all communications made at that time;[18] so an attorney may be called to prove a deed to which he is a witness.[19] In regard to a warrant of attorney, an attorney was called to testify to all that passed respecting the execution of the instrument.[20] Counsel is a competent witness as to an agreement made with a third person at the request of his client.[21] Statement made to an attorney to show that the cause in which he is sought to be retained does not conflict with interests he represents for another is not privileged.[22] If a man consults an attorney in the presence of a third person, or talks so loudly he is overheard, the privilege cannot be claimed to exclude the attorney in one instance, or the person overhearing, in the other instance.[23] If communications are made to an attorney in the course of proressional employment by persons other than his client, or than the latter's agents, and although such communications may be of vast importance to the client, yet it has been decided that they are not privileged. The rule only covers communications made by the client, or whatever agency he may employ.[24] Mere statements made in the presence of the counsel, but not made to him, are not privileged.[25] Attorney who acts as a mere scrivener in making a deed is not privileged;[26] communications made to a student, who is not a clerk, either for the purpose of advice or casually, are not privileged.[27]

6. *Attorney may be a Witness for some Purposes.*—An attorney may be a witness as to the existence of a paper, to allow secondary evidence as to its contents, but he cannot be compelled to produce or disclose the same,[28] or he may be compelled to testify whether his client swore to the answer in chancery on which he is indicted for perjury.[29] An attor-

[18] Coveny v. Tannahill, *supra*.

[19] Doe v. Andrews, Cowp. 845.

[20] Robson v. Kemp, 5 Esp. 52.

[21] Thayer v. McEwen, 4 Bradw. 418.

[22] Heaton v. Findlay, 12 Pa. St. 304.

[23] 15 Cent. L. J. 260.

[24] Randolph v. Quidnek Co., 23 Fed. Rep. 278; 20 Cent. L. J. 396; Crosby v. Berger, 11 Paige, 377.

[25] Shaffer v. Mink, 14 N. W. Rep. 726.

[26] Machette v. Wanless, 3 Colo. 169.

[27] Barnes v. Harris, 7 Cush. 576; Holman v. Kimball, 2 Vt. 555.

[28] Coveny v. Tannahill, 1 Hill (N. Y.), 33; People v. The Sheriff of New York, 29 Barb. 622.

[29] Doe v. Andrews, Cowp. 845; Studley v. Saunders 2 Dowl. & 2 Pyl. 347.

ney may also be obliged to identify his client's hand writing.[30] An attorney may be compelled to disclose what he did with a certain deed when he got it, but not its contents.[31] So also, an attorney's clerk can be questioned as to whether he received a certain paper from a client.[32] If an attorney sue for his fee, he may testify as to the nature of the sevices rendered and the character of the work performed.[33]

7. *When the Service Rendered by the Attorney is for a Criminal or Fraudulent Purpose.* —A client is permitted to converse with his counsel in the most free manner, either for the purpose of defending an action, or commencing a suit, or for the object of ascertaining his rights and liabilities, or to protect himself against litigation threatened,[34] but the law will not allow a client to avail himself of the superior legal knowledge of an attorney in order that he may the more safely evade the law; to extend the protection so far, would hold out an inducement to men to become learned in the law that they may go into partnership with men unscrupulous and artful, with the assurance that they may cover up their part in the dishonest transaction by pleading a privileged relation, as if the license of an attorney was a commission authorizing him to assist and advise others to do what he would not be permitted to do for himself in his own affairs.[35] In Duffin v. Smith,[36] the defendant called the plaintiff's attorney to prove the consideration of the bond as usurious and he was admitted. Lord Kenyon said: "When anything is communicated to an attorney by his client for the purpose of his defense, he ought not to divulge it. But where he himself is as it were, a party to the original transaction, that does not come to his knowledge in the character of attorney and he is liable to be examined the same as any other person." When an attorney advises and assists a client in the perpetration of a fraud, courts incline to hold the attorney a party to the fraud and that he is not discharging the duty of an attorney in such cases but is "*particeps delicto.*" On the other hand, a client may do what the law allows, although the act cannot be commended on strictly moral grounds; but the law does not allow conveyances for the purpose of defrauding creditors, and communications to an attorney to obtain advice and directions to accomplish that end in violation of law, ought not to be protected. There is no consideration that can justify a communication for that purpose; the object is to form a contract which will circumvent creditors, and defraud them out of their legal rights; the contract is illegal and void' if the contract is proven; the duty asked of the attorney is to shape matters so the fraud cannot be proven; can it be said an attorney is discharging his professional duty in contributing to such a result. Every attempt on the part of courts to protect communications under such circumstances, is a step in favor of enlarging the opportunities for fraud.[37] Justice Bronson, in Coveny v. Tannahill,[38] says: "The privilege of attorney and client does not extend to every fact which the attorney may learn in the course of his employment. There is a difference in principle between communications made by the client and acts done by him in the presence of the attorney. It may be and undoubtedly is sound policy to close the attorney's mouth in relation to the former, while in many cases, it would be grossly immoral to do so in regard to the latter. It is the privilege of one who is charged with a wrong, either public or private, to speak unreservedly with his attorney, in preparing for his defense, but he should not be allowed to stop the mouth of one who was present when the wrong was done, upon the allegation he was retained as counsel to see or aid in the transaction. Indeed, I think there can be no such relation as attorney and client, either in the commission of crime or the doing of a wrong by *force* or *fraud* to an individual. The privileged relation of attorney and client, can only exist for lawful and honest purposes." In Bank of Utica v. Mersereau,[39]

[30] Hurd v. Morning, 1 Car. & Payne, 372; Johnson v. Daverne, 19 Johns. 134.

[31] Hington v. Gage, 8 Viner Abr. 548.

[32] Elcke v. Nokes, 1 M. & M. 303.

[33] 17 Cent. L. J. 201; Snow v. Gould, 74 Me. 540.

[34] Bank of Utica v. Mersereau, 3 Barb. Ch. 598; Coveny v. Tannahill, 1 Hill (N. Y.), 33; Follett v. Jeffreyes, 1 Sim. (N. S.) 3.

[35] Amesly v. Earl of Anglesea, 17 How. St. Tr. 1229; Gartside v. Outram, 3 Jur. (N. S.) 39; Story's Eq. Pl. §§ 601, 602; Robinson v. Flight, 8 Jur. 888.

[36] Peake's N. P. Cas. 108.

[37] See also 1 Gilb. Ev. 277; Lord Say and Seal's Case, 10 Mod. 40; Russell v. Jackson, 15 Jur. 1117.

[38] *Supra.*

[39] *Supra.*

the court said: "It may not be a very moral act in a debtor, so to dispose of his property as that his creditors may be effectually prevented from getting execution, but such an act, *per se*, is no fraud, *if the disposition be one which the law allows.*" It is not accurate to speak of cases of fraud contrived by attorney and client together as cases of exception to the rule. They are cases not coming within the rule itself; for the rule does not apply to all that passes between a client and his attorney, but only as to what passes between them in *professional* confidence, and no court can permit it to be said that the *contrivance* of *fraud* can form part of the *professional* occupation of an attorney or solicitor." The law allows a *bona fide* sale by a grantor to an innocent grantee, although the purpose of the grantor was to defraud creditors. The burden is on the complainant to show that the grantee participated in the scheme to defraud the grantor's creditors. Evidence given by the attorney of the grantor of the guilty intent of the latter will not weigh against the grantee until a combination to defraud is first proven and until this is shown, it will not be evidence on which a conveyance can be set aside. But in all cases where a *bona fide* consideration is not shown in the answer to a creditor's bill, there is no objection to interrogating the attorney as to the character of the transaction. If these are the limitations in the application of the rule, I see little virtue in it; because in one case, when the combination is proven, or in the other, when the answer fails to show a *bona fide* consideration, the complainant has established his right to have the conveyance set aside. But the authorities are uniform and emphatic that if an attorney plans and contrives with his client to dipose of the latter's property so as to defraud creditors, he becomes a principal, a co-conspirator and is obliged to testify.[40] In Lord Say and Seal's Case,[41] a fraudulent date was inserted in a deed in the presence of the attorney and the latter was obliged to answer a question directed for the ascertainment of that fact. In Hatton v. Robinson,[42] an attorney was requested by a debtor to draw up a mortgage deed of his personal property and the debtor disclosed his purpose in making such a conveyance but the attorney's opinion was not asked whether on the statement of facts made to him by the debtor the conveyance would be legal. His communication to the attorney as to the object in making the conveyance was admitted in evidence. In Garteside v. Outram,[43] Lord Hatherly said: "There is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a *crime* or a *fraud* and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any *fraudulent intention* on your part; such a confidence cannot exist." The principle of law, therefore, is well settled; but recourse to this exception for the purpose of proving fraud is not clear from difficulties. In Higbee v. Dresser,[44] the court held: "A mere suggestion of fraud will not furnish sufficient grounds for setting aside so well known and salutary a rule as that which protects communications made between attorney and client. * * * If the evidence disclosed anything having the tendency to show that the witness was acting for himself as a party to the transaction, or that he was consulted in aid of any *dishonest purpose*, the matter would have raised a more serious question." "It seems that the legal adviser cannot be asked whether the conference between him and his client was for a lawful or unlawful purpose, though if from independent evidence, it should appear that the communication was made by the client for a criminal purpose, as for instance if the attorney was asked as to the most skillful mode of effecting a *fraud*, or committing any other indictable offense, it is submitted that on the broad principles of penal justice, the attorney would be bound to disclose such guilty project. Nay, it may reasonably be doubted whether the existence of an illegal purpose will not also prevent the privilege from attaching, for it is as little the duty of a solicitor to advise his client how to evade the law, as it is to contrive a positive fraud."[45]

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[40] Greenough v. Gaskell, *supra*; Lord Say and Seal's Case, *supra*; Duffin v. Smith, *supra*; Hatton v. Robinson, 14 Pick. 416; DeWolf v. Strader, 26 Ill. 230; 1 Phillips Ev. 833; 1 Greenleaf on Ev. § 240 and note 2; Russell v. Jackson, 15 Jur. 117; Bank of Utica v. Mersereau, *supra*; Reynell v. Spyre, 10 Beav. 51.

[41] 10 Mod. 40.

[42] *Supra.*

[43] 26 L. J. Ch. 113.

[44] 103 Mass. 523.

[45] Phillips on Ev. § 833 and citations.

## CHATTEL MORTGAGE—GROWING GRAIN—NOTICE.

### GILLILAN V. KENDALL.

*Supreme Court of Nebraska, May 2, 1889.*

1. A chattel mortgage upon growing grain is not constructive notice to third parties of a mortgage on the same grain thereafter lawfully placed in crib or bin, and a dealer in grain who, in good faith, in open market, purchases such grain from the mortgagor, and receives it at his warehouse, will take it free from the lien of the mortgage.

2. The mortgagor of chattels, until foreclosure, possesses a beneficial interest in the property mortgaged, and will convey a good title by a sale of such property to one who purchases in the open market in good faith, and without notice actual or constructive of the mortgage.

MAXWELL, J., delivered the opinion of the court: This is an action by the plaintiff against the defendants to recover for certain growing corn, mortgaged by one Ashton to him, and a portion of which was gathered and sold to the defendants. On the trial the plaintiff recovered for the amount due Ashton upon the corn so sold. The plaintiff contends that he is entitled to recover for all the corn sold by Aston to the defendants, although they had already paid Ashton therefor. The facts are substantially as follows: One Ashton gave two chattel mortgages to the plaintiff in error to secure payment of three of his promissory notes,—one in the sum of $61.30, another in the sum of $225.00, and a third in the sum of $44.50,—which chattel mortgages covered the crop of corn which was growing upon the lands owned by the plaintiff, viz.: the W. ½ of section 30, township 11, range 5, in Lancaster county. These chattel mortgages were duly filed for record in the office of the county clerk on the 3d day of July, 1885, and the 7th day of September, 1885, respectively. During the months of November and December, in the year 1885, the said Ashton gathered and sold, without the knowledge or consent of Mr. Gillian, a portion of the matured crop of this corn to the defendants, Kendall & Smith, who purchased the same in open market at their elevator in Malcolm, through their agent, John Carpenter. Kendall & Smith are grain buyers at Malcolm, and it was admitted at the trial that they had no knowledge of Mr. Gillian's lien upon the corn so purchased by them, except such constructive notice as the filing of the chattel mortgage gave them. The plaintiff introduced the notes in question, and the chattel mortgages securing the same, with proof that they were duly filed, and also testimony tending to show that the defendants had purchased from Ashton about 985 bushels of corn, and that such corn was worth, in the market at Malcolm, at the time stated, from 19 to 21 cents per bushel. There is no testimony tending to show the entire quantity of corn produced by Ashton on the land of the plaintiff in section 30, nor what portion of the crop, if any, Ashton was to deliver to the plaintiff for rent. For aught that appears, the amount of corn still remaining on the farm is sufficient to satisfy the mortgages in question. The court instructed the jury as follows: "A party taking a chattel mortgage upon growing corn, in order to preserve his lien as against innocent purchasers, is bound to see that when the corn is gathered such notice is given to the public of his lien by keeping the same separate and unmixed with other corn as will prevent innocent parties from purchasing such corn; and in this case, if the jury believe from the evidence that the plaintiff, after the execution of the mortgages offered in evidence by him, did nothing more than to file his mortgages in the office of the county clerk, and allowed the corn to become mixed with other corn, and if the jury further believe from the evidence that the defendants, without actual notice of the existence of these mortgages, purchased the corn, or some portion of it, at their elevator in the town of Malcolm, in open market, then the plaintiff cannot recover, and your verdict will be for the defendant." To this instruction the plaintiff excepted, and now assigns the same for error. At law a chattel mortgage passes the legal title in the property mortgaged to the mortgagee, although the mortgagor retains an interest in the property, and may redeem the same at any time before a sale under a foreclosure of the mortgage. In other words, a chattel mortgage is a security in which the legal title to the property mortgaged passes to the mortgagee, but in which the mortgagor retains a beneficial interest. Necessarily, additional labor must be expended on a growing crop to harvest and care for the same. If the mortgagee intrusts this labor to the mortgagor, he to that extent, makes him his employee. If the entire property in the grain had passed to the mortgagee on the execution of the mortgage, then it would be the business of the mortgagee to gather and care for the crop, and if he failed to do so, it would go to waste. Where, therefore, the mortgagor remains in possession, and is permitted to gather the crop, it will be presumed that it was with the consent of the mortgagee. Now, suppose that the security is considerably more than sufficient to pay the debt secured, and is the principal means possessed by the mortgagor for paying ordinary debts, and the means, also, of feeding his stock, and that such mortgagor is feeding his stock from such grain, and selling portions of the same to meet his necessary expenses, and these facts are known to the mortgagee, or he has knowledge of facts sufficient to put him upon inquiry, he certainly cannot follow the grain, and compel the party who has purchased and paid for the same in open market to again pay him for said grain; nor could he claim a lien upon the stock for the grain used to feed it. If the mortgagor was a farmer, and the grain mortgaged included all that he possessed, and it was the intention of the parties that he should continue in the use of the grain for feed or other

necessary purposes about the farm as before the execution of the mortgage, it would not be a breach of the condition to carry out such intention, and the consent of the mortgagee may be implied; and so, that the security shall remain sufficient, the mortgagee would have no cause of complaint. A mortgage of growing crops does not necessarily imply a mortgage of the same grain gathered and placed in a granary or crib, at least so far as constructive notice, to be derived from the filing of a mortgage, is concerned. The lien as between the parties continues, no doubt, but our statutes do not favor secret liens, and this court has so declared in a number of cases. Edminster v. Higgins, 6 Neb. 265; Rhea v. Reynolds, 12 Neb. 133, 10 N. W. Rep. 549. A mortgage, therefore, of growing grain is not notice of a mortgage on grain in a crib or bin, where it has been lawfully placed there by the mortgagee, or by the mortgagor with his consent. If wrongfully or unlawfully removed, the rule would probably be different. At common law, the purchaser of goods in market overt, if he acted in good faith, ordinarily was protected. 2 Bl. Comm. 449, says: "But property may also, in some cases, be transferred by sale, though the vendor hath none at all in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of the law is that all sales and contracts of anything vendible, in affairs or markets overt (that is, open) shall not only be good between the parties, but also be binding on all those that have any right or property therein; and for this purpose, the Mirror informs us, were tolls established in markets, viz., to testify the making of contracts; for every private contract was discountenanced by law, insomuch that our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses." It is not the policy of the law to extend the doctrine of constructive notice to cases where the change in an article mortgaged, made with the consent of the mortgagee, will fail to put a purchaser upon inquiry as to a claim held by a lien on the property. Thus a mortgage of clay in the bank would not be notice to a purchaser of brick manufactured from such clay; nor of wool growing upon sheep of a lien upon the cloth manufactured therefrom. If the cases supposed differ from that under consideration, it is only in degree. In the case at bar a large amount of additional labor was required to husk and gather the corn and prepare it for market. If the mortgage lien continue as notice to third parties after such change in the condition of the property, why may not the mortgagee follow the grain to Chicago, New York, or, in case of its shipment, to England or France, to the ports of either country? No one will contend for such a rule, yet if the first purchaser is chargeable with notice of a secret lien, why is not the second, third, or more remote purchaser? The more salutary rule, no doubt, is to require the mortgagee to look after his security, and, if change is made in its character, to see that his mortgage still imparts notice of his lien on the property to third parties. If the owner of goods stands by and knowingly permits them to be sold as the property of another, he will be estopped from afterwards asserting title thereto, and this rule would seem applicable to mortgages of personal property. There is another reason why the plaintiff cannot recover in this case. There is no proof whatever that the mortgaged property in his possersion is not ample to secure his claim, and on the evidence before us he is entitled to recover nothing; but no objection is made on that ground. The grain in question was purchased in the open market. The mortgagor held an interest in the grain itself, and, there being no sufficient constructive notice to third parties, could pass a good title by the sale. The defendants, therefore, were not liable, and the instruction is not erroneous. The judgment of the district court must be affirmed. The other judges concur.

NOTE.—Without discussing the correctness of the conclusions arrived at by the court in the principal case, its decision against the validity of the mortgage lien appears to conflict with the decisions of other courts in somewhat similar cases.

In a case in Indiana,[1] where growing wheat had been mortgaged and the mortgage had been duly recorded and afterwards the mortgagor without the consent or knowledge of the mortgagee had harvested, threshed, removed and sold the wheat, it was held, that the mortgagee could recover the value of the wheat of the purchaser by identifying the wheat purchased as the wheat that was mortgaged, although the purchaser bought the wheat in the usual course of trade without actual notice of the mortgage. In that case, the court adopted the language of the Massachusetts court, in Coles v. Clark:[2] "We must take it as settled, that a mortgage of a chattel vests a property in the mortgagee; not an absolute title indeed, but a present title defeasible upon a condition subsequent. An actual delivery and change of possession is not necessary to perfect the mortgagee's title, if the mortgage is duly recorded; the registration of the mortgage supersedes the necessity of an actual delivery and gives all parties concerned constructive notice of its execution and existence. It seems to follow as a necessary consequence, that goods mortgaged may be safely left by the mortgagee in the custody of the mortgagor without the former's being chargeable with *laches*. Indeed, the most common object of such a mortgage is to enable the mortgagor to give security on the goods and yet for the time being to retain the custody and use of them. Another consequence of this relation is, that as a general rule, the right "of possession follows the right of property; and, therefore, where there is no restraining stipulation, the mortgagee having the right of property, until defeated by the performance of the condition, has, as incident thereto, the right of possession and may therefore take the goods into his own custody or maintain trespass or trover for them

[1] Duke v. Strickland, 43 Ind. 494. See also Hackleman v. Goodman, 75 Ind. 202.

against any one who takes or converts them for his own use."

In a New York case,[3] it seems to have been considered, that a mortgage of growing grass would pass title to the same when cut and stacked upon other land as against a subsequent purchaser at a sale under execution against the mortgagor, although the decision in the case was against the mortgagee, for want of proof that the mortgage was properly filed.

A chattel mortgage upon a growing crop of oats was held to continue to be a lien upon the oats after they had been harvested, threshed and removed from the land as against an attaching creditor;[4] but not where the statute provided, that "the lien of such mortgage shall cease as against subsequent purchasers unless possession of such crops when harvested be delivered to the mortgagee" and the oats had been cut and stacked without such delivery.[5]

A mortgage of assorted pickles at the time in bulk and salt was held to be a lien as against an attaching creditor of the mortgagor after the pickles had been "greened" and put into bottles and vinegar.[6]

A mortgage of leather cut and prepared for the manufacture of shoes was held to cover shoes subsequently made therefrom by the mortgagor as against attaching creditors.[7]

2 3 Cush. 399.
3 Smith v. Jenks, 1 Denio 580.
4 Rider v. Edgar, 54 Cal. 127. See also Kimball v. Sattley, 55 Vt. 285, 45 Am. Rep. 614.
5 Goodyear v. Williston, 42 Cal. 11.
6 Crosby v. Baker, 6 Allen, 295.
7 Putnamann v. Cushing, 10 Gray, 334.

## JETSAM AND FLOTSAM.

Within the past few days three cities have each suffered the loss, through death, of its oldest and perhaps most prominent lawyer. We refer to the death of Peleg W. Chandler, of Boston, Leonard Swett, of Chicago, and Thomas T. Gantt, of St. Louis. In many respects the life and professional standing of these three Nestors of the bar, were alike. All achieved celebrity in their profession, and were known as lawyers and not politicians. None of them held public office with the exception of Judge Gantt, who was for one year by appointment, Presiding Judge of the Court of Appeals, and a distinguished member of two State constitutional conventions. None of them sought or cared for the allurements which ordinarily attach to the life of a politician and though Mr. Swett was as near to President Lincoln as any man of his time, and during those troubled times was a power behind the throne to an extent that few even of his intimate friends dreamed, he remained steadfast to his profession and could not be led into political channels. By constant study and application, aided by great natural powers, he attained an enviable rank as an advocate. Especially as a criminal lawyer he secured distinction.

He was engaged in many of the celebrated cases in the annals of criminal jurisprudence and in thirty-three murder trials in which he was retained he lost but two.

He was a natural orator. Like most great lawyers he depended as much upon argument as evidence, and his reasoning was so clear and his arguments so logical that opposing counsel have often said that though they were sure the facts were at variance with his reasoning his eloquence was enough to convince the jury that his position was correct. His legal earning was varied and thorough and he possessed a wide knowledge of men and affairs of the day. He was able at a glance to detect the true from the false, and his profound knowledge of the law and his unerring judgment gained him the highest place at the bar and won him the esteem and respect of all classes.

Judge Gantt and Mr. Chandler were somewhat older men than Mr. Swett, they being in the neighborhood of seventy-five years. Mr. Chandler was also prominent during the Presidency of Mr. Lincoln and was one of the most aggressive abolitionists of his time. In 1838 he established the *Law Reporter* and conducted it ten years. Though not a brilliant man he was regarded as an aggressive lawyer of solid and profound attainments and in his time was perhaps as well known and as highly honored as any lawyer in New England.

Of Judge Gantt we can speak more from personal knowledge. He commanded the respect of every one, by his emphatic and rugged honesty, his high minded sense of honor and his unobtrusive and quiet manner. He was not popular in the ordinary sense of the term because he was too honest to court it. He possessed neither the wiles nor the arts of the politician and hence he was not one. Notwithstanding this, he had naturally a most pleasing manner and was the ideal of an honorable, courteous gentleman of the old Maryland school. He stood very high as a lawyer of great learning and wisdom, and of rich scholarly attainments. These, coupled with his strict sense of integrity, earned for him a well deserved and honorable reputation.

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SOME good stories are told of Mr. Chandler illustrative of his aggressiveness when he knew he was right. When he was quite a young man, having but recently entered practice, he was called to defend a case at Lowell. Butler, or one of his clients, had purchased a piece of real estate, in which a woman claimed a right to a portion of the rentals. A tenant paid his rent to her and Butler could not get possession. The case was quite a celebrated one. Choate had been in it and several of the distinguished lawyers of the day. Yet still Butler had the best of it, and the utmost that the opposing lawyers had been able to do was to obtain postponements from time to time, upon various pretexts. At length the case was to come up again. The defendant's lawyers had given it up, and as a last resort she came to young Chandler. He appeared in the defense. Gen. Butler's browbeating methods in court are as well known as the man himself. He tried them on the young man. But for once he met his match. Those who remember the occasion still roar with laughter at the remembrance of Chandler's 13 "stories of the cock-eyed man," which he poured, one after another, relentlessly upon Butler's devoted head, and, as the slang phrase of the present day is, fairly wiped the floor with him. Judge, bar, jury and spectators fell into a tumultuous uproar of laughter, which no officers even attempted to quell. At the close of his anecdotes Mr. Chandler gravely, although his talk had not so much as touched the case, asked for a continuance and got it.

The next day the tenant of Mr. Chandler's client, an apothecary by profession, called upon the lawyer and asked what he should do in case Mr. Butler came to eject him by force.

"Kill him," said Mr. Chandler quietly.

"What!" ejaculated the astonished apothecary.

"Shoot him through the head," insisted the lawyer.

"Just give me that in writing."

Mr. Chandler reached for a pen and wrote:—

"If Benjamin F. Butler attempts to eject you from the premises occupied by you, my advice is to shoot him through the head."

The next day Mr. Butler appeared with a posse, prepared to eject the apothecary. The latter showed him his instructions.

"Pooh!" said Mr. Butler, throwing down the paper. "If you should shoot me you would hang."

"That is no affair of mine," returned the apothecary. "The advice of my counsel is to shoot you if you molest me, and I shall do it," he continued, with blood in his eye, as he produced a big seven-shooter.

"D——d if I don't believe he would be fool enough to shoot me," said Butler, as he turned and left the shop.

He at once called upon Mr. Chandler and effected a settlement of the long contested case, granting to the woman a share in the rents which she claimed.

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BREACH OF CONFIDENCE.—In the matter of United States v. Costen, a proceeding to disbar an attorney on the ground that after having been employed by one of the parties to a litigation, the employment having ceased, he sought employment by the adverse party and offered to impart important information, Judge Brewer, in granting the motion, says: "It is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that the lawyer's tongue is tied from ever disclosing it, and any lawyer who proves false to such an obligation, and betrays or seeks to betray any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust. I can tolerate a great many things that a lawyer may do—things that in and of themselves may perhaps be criticized or condemned, when done in obedience to the interest or supposed interest of his own client, and when he is seeking simply to protect and uphold those interests. If he goes beyond, perhaps, the limits of propriety, I can tolerate and pass that by; but I cannot tolerate for a moment, neither can the profession, neither can the community, any disloyalty on the part of a lawyer to his client. In all things he must be true to that trust, or, failing it, he must leave the profession."

## RECENT PUBLICATIONS.

### BOOKS RECEIVED

LAWYERS' REPORTS, ANNOTATED. BOOK II. All current cases of General Value and Importance decided in The United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Edmond H. Smith, Reporter, Burdett A Rich, Editor in chief of the United States and General Digests, and the Several Reports and Judges of each court, Assistants in Selection. (2 L. R. A.) Rochester, N. Y.: The Lawyers' Co-Operative Publishing Co. 1889.

A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY. By Leonard A. Jones, Author also of Treatises on "Railroad Securities," "Chattel Mortgages," "Liens," Etc., Etc. In Two Volumes. Fourth Edition. Boston: Houghton, Mifflin & Company. New York: 11 East Seventeenth St. The Riverside Press. Cambridge. 1889.

## QUERIES AND ANSWERS.

### QUERY NO. 24.

A and B are the only children of C and D. In 1852, C and D sold land of D (wife of C), and C invested the proceeds in land, taking title in himself. D dies in 1870. In 1873 C marries E. In 1875, C, being heavily in debt, transfers the land to E, who is now in possession of the land. C dies in 1888. A became of age in 1873, B in 1876, and lived on the land with C up to 1881. A now wishes to get possession of his interest in the land, but B will not join with him in any kind of proceeding to get possession. What interest has A in the land? What remedy has A to get possession of his interest? F. J.

## QUERIES ANSWERED.

### QUERY NO. 18.

[*To be found in Vol. 28, Cent. L. J. p. 446.*]

A city of the fourth class in Missouri has no power to pass such an ordinance. The legislature has not expressly given it such power under section 4940 R. S. Mo., and by the rule of construction of *ejusdem generis* it cannot be included in the general police power which the city may exercise under that section. Knox City v. Thompson, 19 Mo. App. 523; St. Louis v. Laughlin, 49 Mo. 561. Even if under Robertson v. R. R. Co., 80 Mo. 123, the city could pass such an ordinance, it would be void as being unreasonable. Taylor v. Goodwin, L. R. 4 Q. B. Div. 228.

### QUERY NO. 19.

[*To be found in Vol. 28, Cent. L. J., p. 446.*]

A has a right of action against B. A lessee cannot dispute the title of his landlord. Taylor on Landlord and Tenant § 89. In Ward v. Phila. 4 Cent. Rep. 662, an owner of land in possession and with full knowledge of his own title who took a lease from a stranger was not permitted to assert his own title against his lessor as a defense to the payment of rent.

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**

1. ACKNOWLEDGMENT.—Under Civil Code Cal. § 1186, a certificate of acknowledgment of a married woman that she was first made acquainted with the contents of the instrument, and thereafter duly acknowledged, upon examination apart from and without the hearing of her husband, that she executed the same, etc., is insufficient, and the mortgage, as to her, is void. — *Bollinger v. Manning*, Cal., 21 Pac. Rep. 875.

2. ATTORNEY—Misconduct.—— An attorney who collects money for his clients, and wrongfully converts it to his own use, and as a subterfuge, and in bad faith, claims that the amount converted was the amount he was entitled to as fees, is guilty of such misconduct as warrants his suspension, if not disbarment.—*In re O——*, Wis., 42 N. W. Rep. 221.

3. CARRIERS. —— Where goods are delivered to the defendant carrier for shipment under a bill of lading stipulating that in case of loss the measure of damages should be the value of the goods at the place of shipment, but the carrier was guilty of a conversion of the goods, such stipulation in the bill of lading is properly ignored, and the value of the goods at the place of destination is the measure of recovery. — *Eric Dispatch v. Johnson*, Tenn., 11 S. W. Rep. 441.

4. CARRIERS — Negligence. —— As to negligence in alighting from moving train by one who goes on car to assist in carrying sick person. — *Louisville & N. Ry. Co. v. Crunk*, Ind., 21 N. E. Rep. 31.

5. CARRIERS—Return Ticket.—— The purchaser of a round-trip railway ticket, can ride from the terminal station to the station at which the trip begins, though he refuses to surrender the first half on demand made by the conductor in accordance with a rule of the company, requiring conductors to take up the whole of such tickets when tendered as fare from the return station or collect full fare, and, if ejected from the train, may recover damages.— *Chicago, St. L. & P. R. Co. v. Holdridge*, Ind., 20 N. E. Rep. 837.

6. CEMETARIES.—Under Code 393, township trustees, having purchased property with township funds, for use as a cemetary, and finding it unfit for that purpose, may sell the same, with a restriction that it shall not be used for a private or public cemetery. — *Bushell v. Whitlock*, Iowa, 42 N. W. Rep. 186.

7. CEMETARIES. —— The title to the cemetery connected with the parish church in Savannah called "Christ Church" was vested by the provincial act of 1758 in the rector of said church as a corporation. — *Church-Wardens v. Mayor*, Ga., 9 S. E. Rep. 537.

8. CHATTEL MORTGAGES. —— Under Code Ga. § 1956, etc., a chattel mortgage executed in February, but not recorded in the county of the mortgagor's residence, will be postponed to a judgment obtained in the following November. — *Thompson v. Morgan*, Ga., 9 S. E. Rep. 534.

9. CHATTEL MORTGAGES—Attachment. —— Plaintiff's mother was indebted to both plaintiff and defendants, and at the urgent solicitation of plaintiff gave him a chattel mortgage to secure his debt, which was duly recorded: *Held*, that defendants, upon subsequently issuing an attachment upon their claim, have no rights entitling them to have plaintiff's mortgage postponed as void in law as against their attachment. — *Dalton v. Stiles*, Mich., 42 N. W. Rep. 169.

10. CONSTITUTIONAL LAW — State Debts. —— Const. Ind. art. 10, § 5, provides that no law shall authorize any debt to be contracted on behalf of the State, except upon the arising of certain contingencies: *Held*, that when, in the exercise of its sound discretion, the legislature determines that a contingency has arisen, and authorizes a debt to be contracted, unless it is plainly apparent that the contingency did not exist which justified the exercise of power, the action of that body is not subject to review. — *Hovey v. Foster*, Ind., 21 N. E. Rep. 39.

11. CONSTITUTIONAL LAW. —— When an act is done under the provisions of a statute, some of which are void and others valid, it will be presumed to have been done without reference to the void or unconstitutional provisions, unless there is something clearly indicating the contrary.—*Donnersberger v. Pendergast*, Ill., 21 N. E. Rep. 1.

12. CONSTITUTIONAL LAW. —— An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault, or neglect on its part, when under the general law of the land no one else is so liable under such circumstances, is void. *Cotrel v. Union Pac. Ry. Co.*, Idaho, 21 Pac. Rep. 416.

13. CONTRACT.——*Held*, that ratification and enforcement of contract rights to cut timber amounted to a waiver of plaintiff's right of action in tort for previous excessive cutting of timber.— *Warren v. Landry*, Wis., 42 N. W. Rep. 247.

14. CONTRACTS — Evidence. —— In an action for obtaining subscriptions to defendants' encyclopedia, where it appeared that defendants agreed to pay plaintiff $15 for each order that he obtained, defendants may show that the words "$15 an order for each and every order obtained for the encyclopedia" meant, $15 for each order obtained for the encyclopedia under which five volumes have been taken and paid for. — *Newhall v. Appleton*, N. Y., 21 N. E. Rep. 105.

15. CONTRACT — Work and Labor. —— Where one is induced under a mistake of fact, through the fraud or concealment of another, to render valuable services for the latter, he may recover the reasonable value thereof, though they were rendered without any expectation at the time of being paid for. — *Boardman v. Ward*, Minn., 42 N. W. Rep. 202.

16. CONTRACTS — Performance. —— The defendant agreed that during a certain period of time he would give to the plaintiff all his freight to haul at a certain rate, and the plaintiff agreed to give defendant's freight preference to all other freight: *Held*, that payment by the defendant for freight hauled, after a violation of the agreement to give his freight the preference, would not operate as a condition of the breach.—*Dunn v. Daly*, Cal., 21 Pac. Rep. 377.

17. CONVERSION. —— *Held*, under items of the will that the executors were given a discretionary power of sale which did not effect a conversion of the realty.—*Scholle v. Scholle*, N. Y., 21 N. E. Rep. 84.

18. CORPORATIONS—Stock—Assessments.——Defendant subscribed to the capital stock of a proposed corporation, "and agrees to pay therefor two dollars in cash on each share on or before January 25, 1888, and the balance on each share at such times and in such installments as the same shall be called for by said corporation." St. 1773, provides for the preliminary organization of corporations, and declares that "no such corporation shall transact business with any other than its members until at least one-half of its capital stock has been duly subscribed, and at least 20 per cent. thereof actually paid in:" *Held*, that no action could be maintained by the corporation against defendant, to recover an assessment subsequent to the preliminary one of two dollars, without alleging that the above statutory requirement had been complied with.—*Anvil Min. Co. v. Sherman*, Wis., 42 N. W. Rep. 226.

19. CORPORATIONS—Treasurer. —— *Held*, that plaintiff had ratified the action of its treasurer in depositing funds with firm which failed and therefore could not hold him personally liable for the loss.—*New York, P. & B. R. Co. v. Dixon*, N. Y., 21 N. E. Rep. 110.

20. CORPORATIONS. —— Charter rights cannot be acquired by lessee of a corporation without the assumption at the same time of the charter duties. — *Mayor v. 23rd St. Ry. Co.*, N. Y., 21 N. E. Rep. 60.

21. CORPORATION — Building Associations. —— One who has contracted with a *de facto* corporation, and received the benefit of his contract, cannot object, to the enforcement of such contract, that the corporation was never legally organized, or that the law under which it was organized is unconstitutional, as such an

objection is available only to the State. — *Winget v. Quincy Building & Homestead Assn.*, Ill., 21 N. E. Rep. 12.

22. CORPORATIONS. —— Under Civil Code Cal. § 2309, providing that authority to execute an instrument required by law to be in writing can only be conferred by writing, a mortgage of real property of a corporation, executed by an agent whose only authority is verbal, is void.—*Alta Min. Co. v. Alta Placer Min. Co.*, Cal., 21 Pac. Rep. 373.

23. COUNTIES—Division.—— How. St. Mich. §§ 458, 460, relating to settlements between the respective boards of supervisors, where two counties are formed out of one, do not contemplate any other division than of existing property and liabilities, nor provide for the assumption by one county of the whole burden of State taxation for both counties until the next equalization. —*Supervisors v. Supervisors*, Mich., 42 N. W. Rep. 170.

24. COUNTIES— Census. —— The object of appointing a census taker in the organization of new counties is to ascertain the truth of the statements contained in the memorial presented to the governor; the census taker should confine himself to those who are *bona fide* inhabitants in the county at the time of the presentation of the memorial. — *State v. Robertson*, Kan., 21 Pac. Rep. 383.

25. COURTS—Costs. —— A suit to foreclose a tax certificate cannot be continued in order to render a judgment for costs, after a redemption of the certificates. The cause of action is the certificate, and the costs are but an incident, which necessarily falls when the cause of action ceases to exist.—*Two Rivers Manuf'g. Co. v. Beyer*, Wis., 42 N. W. Rep. 232.

26. CRIMINAL LAW — Alibi. —— The rule in Georgia, consists of two branches: The first is that, to overcome proof of guilt strong enough to exclude all reasonable doubt, the *onus* is on the accused to verify his alleged *alibi*, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of *alibi* is to be considered on the general case with the rest of the testimony, and, if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence. — *Harrison v. State*, Ga., 9 S. E. Rep. 542.

27. CRIMINAL LAW—Perjury.— Where a public school teacher, on making affidavit, as required by law, to the check drawn by the trustees on the county treasurer for his pay, makes a false statement, he may be prosecuted for perjury, under Pen. Code Tex. art. 188. — *O'Bryan v. State*, Tex., 11 S. W. Rep. 443.

28. CRIMINAL LAW—Murder.——How far intoxication may be an excuse for committing murder. — *Terrill v. State*, Wis., 42 N. W. Rep. 243.

29. CRIMINAL LAW— Embezzlement. —— Where the evidence tends to show that defendant concealed the facts as to the disposition made by him of some of the property intrusted to him as agent for sale on certain prescribed terms, and that he rendered a false account of his agency in regard to it, and that a demand was made on him for the property in question, which he failed to comply with, a conviction for embezzlement is warranted.—*State v. Pierce*, Iowa, 42 N. W. Rep. 181.

30. CRIMINAL LAW— Record. —— A judgment of conviction will not be reversed on the ground that the clerk certified that the testimony taken before the grand jury was read to the trial jury, and that no other evidence was offered by either party, as the clerk had no authority to make such certificate.— *State v. Turney*, Iowa, 42 N. W. Rep. 190.

31. CRIMINAL LAW—Murder.——Conviction of murder in first degree warranted by the facts. — *People v. Kelly*, N. Y., 21 N. E. Rep. 122.

32. CRIMINAL LAW — Rape. —— On a trial for rape, where there was evidence of the unchaste character of the prosecuting witness, and the defense was consent, it was error to instruct that the evidence of character was introduced only to affect the credibility of the prosecuting witness, as such evidence was proper to render the consent more probable.—*Carney v. State*, Ind., 21 N. E. Rep. 48.

33. CRIMINAL LAW—Bigamy. —— It is not proper for the court to charge that if the defendant has by his acts induced others to believe, or the public to believe, that the defendant has cohabited with more than one woman, then his acts are unlawful. — *United States v Langford*, Idoho, 21 Pac. Rep. 409.

34. CRIMINAL LAW—Intent to Kill. —— Where the indictment charged defendant with shooting at H with intent to kill H, and the evidence showed that he intended to kill J, an instruction that if the jury find that defendant shot at J intending to kill him, but wounded H, they should find him guilty, is erroneous. — *People v. Robinson*, Utah, 21 Pac. Rep. 403.

35. CRIMINAL LAW—Cattle Brands. —— Sufficiency of evidence to prove felonious marking of sheep of another, evidence must identify sheep marked by defendant with his own brand.— *People v. Swazey*, Utah, 21 Pac. Rep. 400.

36. DAMAGES—Liquidated.——A manufacturer agreed to deliver a harvester to plaintiff, with contract of warranty, in exchange for a machine belonging to plaintiff, the latter agreeing to pay in addition thereto a named sum, and, in case the harvester should not do good work, the plaintiff was not to pay any money in consideration of the exchange: *Held*, that such contract did not come within the exception of the statute, and that evidence was admissible of the actual damage sustained by plaintiff from a breach of the warranty. — *Greenleaf v. Stockton, etc. Works*, Cal., 21 Pac. Rep. 369.

37. DEED—Construction. —— When an estate is limited in ultimate remainder to the right heirs by blood of the wife, though not to take effect in possession until the death of the husband, the persons contemplated to take in remainder are those kindred of the wife who, according to the laws of inheritance, would take by descent at her death. — *Harrison v. Jones*, Ga., 9 S. E. Rep. 527.

38. DOWER—Mortgage.—— Where a purchaser of the equity of redemption, under a mortgage in which the wife of the mortgagor joined, is not bound to pay the mortgage debt, but does in fact pay it in aid of his own title and estate, whereby the mortgage is discharged, the wife's claim of dower is subject in equity to a just contribution. — *Everson v. McMullen*, N. Y., 21 N. E. Rep. 52.

39. DRAINAGE— Procedure. —— All that a complaint to collect a drainage assessment need show is (1) that some notice of the filing of the petition for the drainage was given; (2) the filing of such petition; (3) the report of the commissioners of the benefits and damages assessed; (4) the approval and confirmation of such report by the court; and (5) the assessment, or a copy thereof.—*Chaney v. State*, Ind., 21 N. E. Rep. 45.

40. DRAINAGE.——Section 10, of the Indiana drainage act, providing that after the construction of a drain the surveyor of the county in which proceedings therefor were had shall keep the drain in repair to the full dimensions, as required by the original specifications, commits the propriety of such repairs to the discretion of the proper county surveyor. —*Kirkpatrick v. Taylor*, Ind., 21 N. E. Rep. 21.

41. ELECTIONS AND VOTERS. —— A disregard of constitutional or statutory directions, except as to the time and place of holding the election, relating to the manner of conducting it, and which does not affect the result as a fair expression of the popular will, does not warrant a rejection of the vote cast.— *State v. Nicholson*, N. Car., 9 S. E. Rep. 545.

42. EMINENT DOMAIN. —— Under § 26 of the "rapid transit act," an elevated railroad company may construct a curve so as to make a connection between two of its own distinct lines of road, and may take private property for that purpose.—*In re Union El. R. Co.*, N. Y., 21 N. E. Rep. 81.

43. ESTOPPEL —— Where one who had entered into an agreement for the conveyance of land represents to

one about to make a loan to the vendee, and take a mortgage therefor, that the latter had a sufficient interest in the land to make the mortgage good, the vendor is estopped from afterwards asserting that the vendee did not have a mortgable interest in the land.—*Wiechart v. Hedrick*, Ind., 21 N. E. Rep. 30.

41. EVIDENCE. —— It is the duty of the trial court to declare the legal effect of all written instruments submitted in evidence; but a letter is not generally such an instrument. To make it such it must constitute a contract.— *Church v. Mellville*, Oreg., 21 Pac. Rep. 387.

45. EXECUTION.—— The levy of execution on land as the property of defendant is sufficient to keep the judgment alive, though the land was not defendant's property at the time. — *Long v. Wight*, Ga., 9 S. E. Rep. 535.

46. EXECUTION — Under Code Iowa, § 3137, providing proceedings supplementary to execution a referee has jurisdiction to issue warrant for arrest of the debtor on the required proof being made. — *Marriage v. Woodruff*, Iowa, 42 N. W. Rep. 198.

47. EXECUTION. —— Affidavit in proceedings supplementary to execution may be amended after a demurrer to it has been sustained. Question as to the sufficiency of affidavit here. — *Burkett v. Bowen*, Ind., 21 N. E. Rep. 38.

48. EXECUTORS AND ADMINISTRATORS—Sales. —— An administrator's sale of land on a petition which merely describes the land sought to be sold, and states that it is an unperfected claim under the homestead laws, and does not state its value, or whether improved or unimproved, productive or unproductive, occupied or vacant, and the like, is void for want of jurisdiction, where, in the order of sale, there is no recital that proofs of the necessity for the sale for any of the statutory purposes were had at the hearing. — *Kertchem v. George*, Cal., 21 Pac. Rep. 372.

49. FACTORS AND BROKERS. —— Where a real estate broker, employed to sell land, or to find a purchaser therefor, negotiates an exchange for other lands, his principal himself making the contract, these circumstances impose no legal duty upon the broker to ascertain correctly the facts which may affect the value of the lands received in exchange. — *Coe v. Ware*, Minn., 42 N. W. Rep. 205.

50. FALSE IMPRISONMENT. —— Necessary allegations in complaint for false imprisonment. — *Ah. Long v. Sternes*, Cal., 21 Pac. Rep. 381.

51. FEDERAL COURTS— Jurisdiction. —— Under act Cong. 1887, a suit brought by two persons on a contract entered into by them as partners cannot be maintained in a district of which the defendant and one of the plaintiffs are non-residents. — *Smith v. Lyon*, U. S. C. C. (Mo.), 38 Fed. Rep. 53.

52. GARNISHMENT. —— A party, in order to establish title to a debt under proceedings in garnishment upon execution, must show that a levy was made by virtue of the execution upon the debt, and that the law relating to such proceedings had been strictly complied with.—*Batchellor v. Richardson*, Oreg., 21 Pac. Rep. 392.

53. HIGHWAYS.——Where, after a highway has been established, but before it is opened, the adjacent owner, and those claiming under him, occupy for more than ten years the land on which such road is laid out, maintaining a fence around it, and being in exclusive possession, the public is estopped to claim a right in the part so inclosed. — *Orr v. O'Brien*, Iowa, 42 N. W. Rep. 183.

54. HIGHWAYS—Discontinuance. —— Under How. St. Mich. § 1298, it is only owners and occupants who can complain of the discontinuance, and a person whose premises are so situated that he could not reach the discontinued way without first crossing a public street, communicating with others in various directions, and furnishing abundant guards against isolation, has no right to complain. — *Kimbal v. Homan*, Mich., 42 N. W. Rep. 167.

55. HOMESTEAD.—— Where part of a tract forming a homestead was under cultivation, and the remainder was valuable principally for its timber trees, and the removal of the trees would impair the security of a judgment against the owner: *Held*, that the judgment creditor was entitled to have the owner restrained from selling and cutting such timber trees for any purpose other than the necessary repairs and improvements.—*Jones v. Britton*, N. Car., 9 S. E. Rep. 554.

56. HUSBAND AND WIFE. —— A married woman with her husband's written consent. may bind her statutory personal separate estate by her engagements in the nature of executory contracts expressly charged thereon in the instrument creating the liability, though the consideration is not for the benefit of herself or her estate.—*Flaum v. Wallace*, N. Car., 9 S. E. Rep. 567.

57. HUSBAND AND WIFE.——Agreement between husband and wife being executed, the law will recognize it, though, if executory, its validity might have been denied on the ground of its being opposed to public policy in providing for the separation of husband and wife.—*Tallinger v. Manderville*, N. Y., 21 N. E. Rep. 125.

58. INJUNCTION. —— In *ad quod damnum* proceedings against a railroad company, defendant can make the defense that the right of way was acquired and paid for by another company, whose rights defendant has acquired under foreclosure of a mechanic's lien; that plaintiff's claim is barred by limitation; and that he is estopped to deny defendant's right of occupancy. — *Keokuk & N. W. Ry. Co. v. Donnell*, Iowa, 42 N. W. Rep. 176.

59. INSURANCE — Accident. —— *Held*, that deceased was not insured for the period in which he was killed, as the order to the railroad company did not under the circumstances amount to payment of the premium. — *McMahon v. Trav. Ins. Co.*, Iowa, 42 N. W. Rep. 179.

60. INSURANCE. —— A condition of a policy against incumbrances is waived where the assured informed the company's agent of such incumbrances, and the agent wrote the application, which stated that there were no incumbrances, and the assured signed it at his request, and the agent stated in the application that he had inspected the property, and recommended the risk as free from all moral or financial hazard, and was satisfied that the answers were correct. — *Reiner v. Dwelling-house Ins. Co.*, Wis , 42 N. W. Rep. 208.

61. INSURANCE—Conditions.——Effect of provision in a fire insurance policy issued to the plaintiff, that, in case the assured should fail to pay the premium note at maturity, the policy should be and remain null and void, but that this should not prevent the company from collecting by suit or otherwise the note, nor should such attempt at collection be construed to revive the policy, but the same should remain null and void until payment of the note, when the policy should be revived. — *Curtin v. Phenix Ins. Co.*, Cal., 21 Pac. Rep. 370.

62. JUDGMENT—Lien.——A judgment against partners for a firm liability is a lien against their individual real estate, and has preference over an unsecured debt of one of them in the administration of his assets after his decease.—*Pitts v. Spotts*, Va., 9 S. E. Rep. 501.

63. JUDGMENT — Res Adjudicata. —— So much of a former action as was based on the allegation of waste was for an injury to real property, a judgment in such action could not be a bar to the subsequent action for the conversion of the wood, which was personalty. — *Mauldin v. Clark*, Cal., 21 Pac. Rep. 361.

64. JUROR— Misconduct. —— Where it appears that while a case is being considered by a jury two of the jurors tell the others that they are acquainted with a certain witness in the case, and that they do not regard him as worthy of credit, and it appears probable that one of the jurors was influenced in his verdict by such statements, a new trial should be granted. — *Lucas v. State*, Tex., 11 S. W. Rep. 443.

65. JUSTICE OF PEACE—Appeal.——A party objecting to a decision rendered in a justice's court must in an

intelligible manner, and at the time, make his objection known, in order to have the decision reviewed by proceedings in error. — *Condray v. Stiefel*, Iowa, 42 N. W. Rep. 185.

66. JUSTICE OF THE PEACE—Habeas Corpus.—Where the justice has jurisdiction, and the case has been conducted in strict conformity with the established rules of procedure in such cases, the sufficiency of the evidence upon which the judgment is based cannot be inquired into on *habeas corpus*. — *Ex parte Marx*, Va., S. E. Rep. 475.

67. LANDLORD AND TENANT. —— Evidence held not sufficient to establish relation of landlord and tenant between plaintiff and his sister who occupied house of the former.—*Colleyer v. Collyer*, N. Y., 21 N. E. Rep. 114.

68. LANDLORD AND TENANT.—An action for use and occupation will not lie against a party in possession of real estate by the license of the owner.—*Reed v. Lammel*, Minn., 42 N. W. Rep. 202.

69. LIMITATION OF ACTIONS.—— Indorsement on note of part payment by the payee is insufficient to take it out of the statute, when there is no extrinsic proof of the time when the indorsement was made. — *Mills v. Davis*, N. Y., 21 N. E. Rep. 68.

70. LOGS AND LOGGING.——Under Rev. St. Wis. § 2886, a complaint praying for a balance due for work on logs, and alleging all the facts essential to entitle plaintiff to a lien on the logs, but not praying for such lien, will not support a judgment for the lien, in the absence of an answer. — *McKenzie v. Peck*, Wis., 42 N. W. Rep. 247.

71. MALICIOUS PROSECUTION—Advice of Counsel.—— The rule in actions for malicious prosecution laid down in Moore v. Railway Co., 37 Minn. 147, 33 N. E. Rep. 334, that it is for the court to determine whether a state of facts, over which there is no controversy, constitutes probable cause warranting a prosecution, followed and applied.—*Gilbertson v. Fuller*, Minn., 42 N. W. Rep. 203.

72. MASTER AND SERVANT.——Question as to whether laborer on construction train is a fellow servant with the crew manning the train. — *Prather v. Richmond & D. Ry. Co.*, Ga., 9 S. E. Rep. 530.

73. MARRIAGE. —— The presumption of law founded on cohabitation and repute, that a marriage had taken place, will not prevail over proof of a subsequent marriage in fact by one of the parties with a third person; but, notwithstanding such proof, circumstantial evidence, as well as direct, may be used to establish the actual occurrence of such prior marriage. — *Jenkins v. Jenkins*, Ga., 9 S. E. Rep. 541.

74. MARRIAGE — Validity. —— *Held*, that verdict in favor of the existence of a marriage was supported by the evidence, though circumstantial.—*Gall v. Gall*, N. Y., 21 N. E. Rep. 106.

75. MARRIAGE—Validity. —— However true it be that what is done in contravention of a prohibitory law is null, and is barren of effect, the law creates an exception, in cases of marriage contracted in good faith, in favor of both spouses, or of one of them and of the issue born of such marriages. — *Succession of Buissiere*, La., 5 South. Rep. 668.

76. MECHANIC'S LIENS. —— The fact that plaintiff did not finish a building, the construction of which he had commenced under a contract with defendant, his failure being solely due to the refusal of the defendant to allow him to proceed with the contract, did not preclude him from asserting his right to a lien on the building for the contract price, less the cost of finishing it. — *Charnley v. Honig*, Wis., 42 N. W. Rep. 220.

77. MINES AND MINING. —— Where mining works are idle, time and labor of a watchman and custodian expended on the property in taking care of it is labor done on the claim. — *Lockhart v. Rollins*, Idaho, 21 Pac. Rep. 413.

78. MORTGAGE. —— M mortgaged his 80-acre tract to D, his wife joining to release her dower. M then conveyed the north forty-five acres to his wife by warranty deed, with covenants of seizin, and that the land was free from all incumbrances. Thereafter M gave a mortgage to complainant on the south thirty-five acres, his wife joining to release her dower: *Held*, that the wife had a right to insist that the south thirty-five acres be first sold under D's mortgage, before resorting to the part conveyed to her. — *Case Threshing-machine Co. v. Mitchell*, Mich., 42 N. W. Rep. 151.

79. MORTGAGE. —— A bill of sale, not under seal, absolute on its face, may be shown by parol evidence to have been given as security; and the rule that, to prove that a deed absolute on its face was intended as a mortgage the evidence must be clear, convincing, and equivocal, does not apply.—*Seligman v. Ten Eyck*, Mich., 42 N. W. Rep. 134.

80. MORTGAGE. —— Recorded deed and agreement held, under the facts to be a mortgage. — *Baker v. Firemans' Fund Ins. Co*, Cal., 21 Pac. Rep. 357.

81. MUNICIPAL CORPORATIONS.—— In an action against a city for damages to plaintiff's property, caused by an excavation in the street in front thereof, it appeared that part of the land was well adopted to be laid out into lots, and would be of most use and value in that form, and that a plat of it had been made, but not recorded so as to make it a legal addition to the city: *Held*, that it was proper to allow witnesses to refer to and examine the plat with the object of showing the location and situation of that part of the property injured by the excavation. — *Meinzer v. City of Racine*, Wis., 42 N. W. Rep. 230.

82. MUNICIPAL CORPORATIONS— Negligence.—— How. St. Mich. § 1445, imposing on municipalities the duty of keeping streets in good repair, must be construed, as to streets in the city of Detroit, with reference to the provision of the charter of that city empowering the common council to grade and pave streets, and must not be construed to nullify such provision; but that portion of a street which is being graded or paved must be closed to public travel in order to suspend the duty to repair, and, unless it is so closed, the duty to repair, and liability for injuries caused by the unsafe condition of the street remain.— *Southwell v. City of Detroit*, Mich., 42 N. W. Rep. 118.

83. MUNICIPAL CORPORATIONS. —— In an action for the rent reserved on the lease of a pier by New York city defendant cannot avoid liability on the ground that the lease was not "made at public auction, to the highest bidder," as required by Laws N. Y. 1870, ch. 383, § 37. Defendant having enjoyed the benefit of the lease, is estopped to deny its validity.—*Mayor v. Sonneborn*, N. Y., 21 N. E. Rep. 121.

84. MUNICIPAL CORPORATIONS. —— In establishing a grade for a street, and adopting plans for its improvement, the common council acts judicially, and no recovery can be had for the inconvenience thereby occasioned.—*Watson v. City of Kingston*, N. Y., 21 N. E. Rep. 102.

85. MUNICIPAL CORPORATIONS.—Evidence considered sufficient to justify a verdict charging a municipal corporation with negligence in the construction of a culvert, and to justify the verdict as to the amount of damages. — *Buchanan v. City of Duluth*, Minn., 42 N. W. Rep. 204.

86. MUNICIPAL CORPORITION. —— Under Rev. St. Ind. 1881, § 3103, as to interstate ferries, the city council can make only such regulations as are conformable to the regulations of the county commissioners, and a complaint for violating on Sunday, an ordinance of a city on a border stream, will be dismissed, as it may reasonably be inferred that the regulations of the county commissioners did not require this on Sundays. — *City of Madison v. Abbott*, Ind., 21 N. E. Rep. 28.

87. NEGLIGENCE—Railroad Company.——Question of negligence for injuries to boy at a railroad crossing by passing train.—*Heddles v. C. & U. W. Ry. Co.*, Wis., 42 N. W. Rep. 237.

88. NEGLIGENCE. —— Question of contributory negligence on the part of boy injured by passing wagon

while getting on to platform of car. — *Connolly v. Knickerbocker Ice. Co.*, N. Y., 21 N. E. Rep. 101.

89. NEGLIGENCE—Infant.——In an action for ejecting plaintiff, a child from defendant's railway train, where it appears that the child had taken the train to go about four and one-half miles, and was put off the train for non-payment of seven cents fare about half a mile from the depot from which she started, evidence that another train was expected to arrive at the place of plaintiff's removal within a few moments is admissible, as bearing on the question whether that was a proper place for such removal. — *Ill. Cent. Ry. Co. v. Latimer*, Ill., 21 N. E. Rep. 7.

90. NEGOTIABLE INSTRUMENT. —— In an action on notes given for the purchase price of an engine and saw-mill, a plea of breach of warranty and failure of consideration does not vary or contradict the written contract between the parties, and may be made without alleging fraud, accident, or mistake.—*Aultman v. Mason*, Ga., 9 S. E. Rep. 536.

91. NEGOTIABLE INSTRUMENT. —— Under Code. Ga. § 3471, defendant, in an action on a note, after pleading the general issue, may amend so as to allege as a defense that the note was given in part payment for land; that plaintiff represented that he had a complete title to the land, and agreed to deliver a perfect title, but that in fact he failed to give him title, whereby the consideration of the note wholly failed. — *Hall v. McAuthur*, Ga., 9 S. E. Rep. 534.

92. NEGOTIABLE INSTRUMENT. —— An accomodation note has no validity until it has passed into the hands of a third party for value. — *Second Nat. Bank v. Howe*, Minn., 42 N. W. Rep. 200.

93. NEGOTIABLE INSTRUMENTS—Contract of Guaranty. ——A written instrument, in the ordinary form of a promissory note, with the exception of a clause stating that the note is given to secure the payment of a certain debt, does not become a contract of guaranty by the addition of such clause. — *Clanin v. Esterly Machine Co.*, Ind., 21 N. E. Rep. 35.

94. NUISANCE. —— Area or alley next to defendant's store piled with boxes held not a nuisance. — *Bond v. Smith*, N. Y., 21 N. E. Rep. 128.

95. NUISANCE. —— The growing of cotton wood trees near line of plaintiff's fence the effect of the shade of which would be injurious to plaintiff's fruit trees held not a nuisance.— *Grandona v. Lovdal*, Cal., 21 Pac. Rep. 366.

96. PARTNERSHIP— Assignment. —— Under the facts, held sufficient authority for one partner to execute assignment for the benefit of creditors in the firm name. —*Klump v. Gardner*, N. Y., 21 N. E. Rep. 99.

97. PARTNERSHIP. —— The fact that defendant, who was a partner of the plaintiff, managed the firm business, while the plaintiff gave it but little attention, did not authorize the entire salary of a clerk employed by them to be charged against the plaintiff, in the absence of a special agreement to that effect.—*Brownell v. Steere*, Ill., 21 N. E. Rep. 3.

98. PARTNERSHIP—Contract. —— Where plaintiff and defendant formed a partnership to deal in real estate, the defendant could not, in an action brought by the plaintiff for his share of the profits, and for an accounting, object that the partnership agreement was in parol, and void under the statute of frauds.— *Coward v. Clanton*, Cal., 21 Pac. Rep. 359.

99. QUO WARRANTO—Mandamus.—— While it is true that *quo warranto* is the proper proceeding to try the title to an office, and that it cannot be tried in *mandamus*, such trial of the title means the right to possession of the office, when such possession is held by another, whom the purpose of the action is to oust. When there is no such occupant, *quo warranto* cannot be resorted to.—*Williams v. Clayton*, Utah., 21 Pac. Rep. 398.

100. REMOVAL OF CAUSES.—— Separate answers tendering separate issues interposed by defendants sued jointly do not create separable controversies, within the meaning of the removal acts. — *Patchin v. Hunter*, U. S. C. C. (Wis.), 38 Fed. Rep. 31.

101. REMOVAL OF CAUSES. —— As the Illinois statute provides that a cause may be removed for local prejudice to some other court of competent jurisdiction in some other convenient county, to which there is no valid objection, the existence of prejudice was not sufficiently shown to justify removal to the federal court; the affidavit shows that the prejudice is confined mainly, if not entirely, to Cook county. — *Robison v. Hardy*, U. S. C. C. (Ill.), 38 Fed. Rep. 49.

102. RES ADJUDICATA—Insurance.——The mere commencement of an action for damages for breach of a written contract, the action being afterwards dismissed without a determination on the merits, does not conclusively bar a subsequent action for reformation of the contract. — *Spurr v. Home Ins. Co.*, Minn., 42 N. W. Rep. 206.

103. REVIVAL OF ACTIONS. —— The fact that the proceedings in an action, at the time of the death of one of the parties, do not disclose facts showing that the action survives, does not defeat the right to continue it in favor of or against the representative of the deceased, if the cause of action in fact survives. — *Plumer v. McDonald Lumber Co.*, Wis., 42 N. W. Rep. 250.

104. SALE. —— If it can be inferred from the acts of the parties that it was the intent that delivery of article and payment should be concurrent acts, title will be deemed to have remained in the vendor until completion of payment.— *Empire State, etc. Co. v. Grant*, N. Y., 2 N. E. Rep. 49.

105. SHERIFF—Bond. —— The act of a sheriff in levying, under a writ, upon the property of a third person, is an official act, for which his sureties are liable. A judgment against a sheriff for official misconduct is *prima facie* evidence in an action for the same wrong against his sureties. — *People v. Mersereau*, Mich., 42 N. W. Rep. 153.

106. SPECIFIC PERFORMANCE. —— Plaintiff agreed to buy and defendant to sell a certain lot, and afterwards they agreed that the lot and another should be sold by defendant to plaintiff's son at a different price with the right to a reconveyance to defendant of the second lot, within a given time: *Held*, that the first contract was waived, and specific performance could not be decreed. —*Ford v. Euker*, Va., 9 S. E. Rep. 500.

107. SUBROGATION. —— A judgment creditor, after purchasing his debtor's land at a sale under his judgment, and before the statutory period of redemption expires, has a lien on the land, giving him the right to be subrogated to the benefits of a trust-deed prior to his judgment, under Civil Code Cal. § 2904. — *Swain v. Stockton Sav. & Loan Soc.*, Cal., 21 Pac. Rep. 365.

108. TAXATION—Exemption.—— Under laws N. Y. the building owned by Young Men's Christian Association not used exclusively for public worship is not exempt from taxation. — *Y. M. C. Assoc. v. Mayor*, N. Y. 21 N. E. Rep. 86.

109. TAXATION—Legacy. ——Laws N. Y. 1885, ch. 483, § 1, imposing tax on legacies, applies only to the property of resident decedents. — *In re Euston's Estate*, N. Y 21 N. E. Rep. 87.

110. TAXATION.—— Plaintiff, under protest, gave the tax collector his note for nearly the whole amount of an alleged illegal tax, paying a small amount in money, and taking the collector's receipt for the tax: *Held*, that plaintiff had no right of action, except as to the money payment, and that it was immaterial that he made a payment on the note after suit brought, or that at the trial he offered to allow a set-off of the balance due on the note.—*Turnbull v. Township*, Mich., 42 N. W. Rep. 114.

111. TAXATION.—— Act Mich. 1869, § 124, providing for the relsale of lands bought by the State at tax-sale remaining unsold for five years, and for charging back to the proper county any deficiency in the amount bid at such resale below the amount bid by the State at the first sale, is invalid, so far at least as it requires losses sustained on previous purchases to be charged back to the county. — *Auditor General v. Board*, Mich., 42 N. W. Rep. 143.

112. TELEGRAPH COMPANY.—— As to the measure of

damages in actions against telegraph companies for negligence in transmission of message. — *West. Union Tel. Co. v. Du Bois*, Ill., 21 N. E. Rep. 4.

113. TRESPASS — Contract. —— In suit for trespass against party who claimed under a contract for work done therupon the right to use water ditch: *Held*, that a party to a valid contract, in the absence of fraud or other special reason, cannot rescind at pleasure, that where there has been part performance a party cannot rescind and still retain the benefits received under the agreement.—*Bowman v. Ayers*, Idaho, 21 Pac. Rep. 405.

114. TRUST.——Question whether the facts constitute a constructive trust. — *Gruhn v. Richardson*, Ill., 21 N. E. Rep. 18.

115. VENDOR AND VENDEE.——Question as to authority of auctioneer to sell property.—*Muffatt v. Gott*, Mich., 42 N. W. Rep. 149.

116. VENDOR AND VENDEE.—— Where a vendee gives a note for the price, which is a lien on the land sold, the possession of such note by one purchasing the land from the vendee is *prima facie* evidence of payment by one of them, and, the note being found among the papers of such purchaser after his death, it was presumptively in his possession while living.—*Potts v. Coleman*, Ala., 5 South. Rep. 780.

117. VENUE. —— Where suit by attachment is instituted in a county other than that of the defendant's residence, but where one summoned as garnishee resides, under Code Miss. § 2418, and which does not provide for a change of venue to the county of the defendant's residence, the granting of a change of venue to the latter county on the ground that the suit was not brought in the proper county will not confer jurisdiction upon the court of the latter county. — *Baum v. Burnes*, Miss., 5 South. Rep. 697.

118. VERDICT. —— In an action based on the breach of two contracts, one a promise to marry, and the other an agreement to convey certain property to plaintiff in consideration of her services as defendant's housekeeper, the two contracts being inconsistent, and the defense a general denial, it is error to accept a general verdict for plaintiff for a sum greater than the damages alleged from either cause of action.— *Schofield v. Miltimore*, Wis., 42 N. W. Rep. 212.

119. VERDICT—Affidavit of Juror. —— In an action on a note, one of the issues was as to whether the defendant, at the time of executing the note, understood that he was executing it for a certain amount, and the jury answered "Yes" to a special interrogatory upon such issue: *Held*, that the affidavits of the jurors were not admissible to show that they intended to answer "No." —*McKinley v. First Nat. Bank*, Ind., 21 N. E. Rep. 36.

120. WATER AND WATER-COURSES.——In an action by the owner of a lower mill-site against the owner of the upper one, to determine their respective rights in the water-power, plaintiff has the burden of proving his allegation that the wheels of defendant's mill are lower than the wheels of such mill were when plaintiff's mill-site was conveyed by the common owner of both. — *Mack v. Bensley*, Wis., 42 N. W. Rep. 15.

121. WATERS AND WATER-COURSES.——The common-law doctrine of riparian rights, that every riparian owner is entitled to the natural flow of the stream through his land as it was wont to run, is not applicable to streams in Nevada, but the rights should be determined by the doctrine of prior appropriation. — *Reno Smelting Works v. Stevenson*, Nev., 21 Pac. Rep. 317.

122. WATERS AND WATER COURSES—— Where one has appropriated the waters of a stream flowing across public lands, by erecting on his own lands a ditch, one acquiring title from the United States takes subject to such appropriation, and he cannot, by obstructions on his own land, divert the water from the ditch of the prior appropriator. — *Geddis v. Parrish*, Wash. Ter., 21 Pac. Rep. 814.

123. WILL. —— *Held*, in view of the general principal making a life-tenant liable for the interest on a mortgage accruing during the continuance of his estate, and the plan of the will as evidenced by the provisions mentioned, the direction to the trustees to pay interest, etc., on mortgages on the homestead out of his estate, did not authorize the application of the principal of the fund to the payment of such interest, as only unequivocal expressions should be given that effect.—*In re Albertson*, N. Y., 21 N. E. Rep. 117.

124. WILLS — Codicil. —— Where a codicil to a will provides that all of the will inconsistent therewith is revoked, and then proceeds to make a new disposition of all testator's property, making special bequests and devises, and leaving all the residue to certain persons, the will is entirely revoked, except the appointment of executors, which matter was not mentioned in the codicil.—*Newcomb v. Webster*, N. Y., 21 N. E. Rep. 77.

125. WILL—Devise.——Testator bequeated all his property, to his executors, in trust to invest in government bonds, and to pay the income of a small part to his mother for her life, and upon all the rest and residue, including that devised to his mother, upon her death, to his wife for life, remainder over to his surviving children: *Held*, that the will effected a conversion of the property, and put the widow to her election as to the provisions made for her. — *Asch v. Asch*, N. Y., 21 N. E. Rep. 70.

126. WILLS.—— A devise to executors in trust, with directions to sell the real estate, and to apply the funds to the use of a charitable institution not yet in existence, but which he instructs his executors to procure to be incorporated by a special act of the legislature as soon as possible, but at least within ten years from testator's death, is void fer uncertainty. — *Cruikshank v. Chase*, N. Y., 21 N. E. Rep. 64.

127. WILLS—Remainders.——In a devise to a wife for life, with remainder to the legal heirs of the testator, to create a contingent remainder the intent so to do must be expressed in words so plain that there is no room for construction. — *Bunting v. Speck*, Kan., 21 Pac. Rep. 288.

128. WILLS—Undue Influence.——Upon the contest of a will, on the ground of undue influence exercised by the parents of a principal beneficiary, while portions of letters of the testatrix written before the execution of the will showing unkind feelings towards the beneficiary are admissible, other portions, showing like feelings towards the parents and brother of the beneficiary, they not being provided for in the will, should be excluded.—*Robinson v. Stuart*, Tex., 11 S. W. Rep. 275.

129. WITNESS — Conspiracy. —— Testimony as to a conversation between witness, the principal, and another, defendant not being present, wherein the principal confessed his guilt, and narrated the circumstances of the murder, is inadmissible until a conspiracy is proved.—*Crook v. State*, Tex., 11 S. W. Rep. 445.

130. WITNESS — Bastardy. —— In a prosecution for bastardy, where the principal witnesses are the defendant and the prosecuting witness, a charge of the court that, in determining the degree of credibility to be attached to the testimony of the witnesses, the pecuniary interest of the parties in the event of the suit is to be taken into consideration, and that the defendant has a more direct pecuniary interest in the suit than the prosecuting witness, is not error.—*Kenney v. State*, Wis., 42 N. W. Rep. 213.

131. WITNESS. —— On a trial for murder, evidence of confessions made by a witness for defendant while she was under arrest, charged with complicity in the same crime is admissible to impeach her, though the evidence is such as, by statute, would not be admissible on trial of the witness.—*Hawkins v. State*, Tex., 11 S. W. Rep. 409.

132. WRITS.—— An objection to the effect of a citation and to its sufficiency to bring an absentee into court as a garnishee in an attachment suit, is substantially an exception to the jurisdiction of the court *ratione personæ*, and to be availing, it must be formally presented *in limine*, and by way of exception.— *Gomilla v. Milliken*, La., 5 South. Rep. 548.

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